Supreme Court, U. S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1597

JOHN BROWN and JOHN CURINGTON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	Page
List of Authorities	ii
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case	3
Reasons for Granting the Writ	12
Question One	12
Question Two	14
Question Three	16
Conclusion	18
Certificate of Service	19
Appendix A	A-1
Appendix B	A-4
Appendix C	A-5

Cases Page

Alderman v. United States, 394 U.S. 165 13
Brady v. Maryland, 373 U.S. 83 ..... 16, 17
Dickey v. Florida, 398 U.S. 30 15
Levin v. Clark, 408 F.2d 1209 18
Pierce v. United States, 414 F.2d 163 18
Silverthorne Lumber Co. v. United States, 251 U.S. 385 12, 13
United States v. Crane, 445 F.2d 509 ..... 17, 18
United States v. Falley, 489 F.2d 33 13
United States v. Hunt, 505 F.2d 831 4
United States v. Magaddino, 496 F.2d 455 ..... 13, 14
United States v. Marion, 404 U.S. 307 15
United States v. McCann, 465 F.2d 147 4
United States v. Resnick, 483 F.2d 354 14
United States v. White, 450 F.2d 264 17
Weeks v. United States, 232 U.S. 12
Wong Sun v. United States, 371 U.S. 471 14

Constitutional Provisions

United States Constitution, Fourth Amendment 3
United States Constitution, Fifth Amendment 3, 14

Statutes

Title 18, U.S.C.
Sec. 1341 2
Sec. 2511 ..... 3, 4, 12
Sec. 2515 ..... 3, 12
Sec. 3231 3
Sec. 1254(1) 2
Rule 16(g), Fed.R.Crim.P. 16

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UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners, John Brown and John Curington, pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit, rendered in these cases on January 15, 1976, motion for rehearing being thereafter overruled on March 4, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals appears at Appendix A, infra, at p. A-1. The order of the Court of Appeals overruling motion for rehearing at Appendix B, infra, at page A-3. The opinion of the Court of Appeals is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered January 15, 1976. Motion for rehearing was overruled March 4, 1976. This Court, on March 23, 1976, extended the time for filing this Petition to May 3, 1976, by written order signed by Justice Powell. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Petitioners were convicted in the Northern District of Texas for violations of Title 18 U.S.C. §1341 (mail fraud). The following questions are presented for review:

1. Did the district court err in failing to suppress evidence seized as a result of or tainted by unlawful electronic surveillance, because the government, though admitting the illegality of the electronic surveillance, failed to carry its burden of proof that the evidence admitted at trial was of independent origin

2. Did the district court err in failing to dismiss the indictments because of an extremely long delay in bringing the prosecution, which resulted in the unavailability of a critical defense witness (through death) and thus denied Petitioners their right to due process of law?

3. Should the convictions be set aside because of the government's failure to make timely disclosure of evidence extremely favorable to the defense, even though the government had been specifically ordered to do so by the court many months prior to trial and had agreed to do so?

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. Constitution of the United States, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."

2. Constitution of the United States, Amendment V:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

3. Title 18 U.S.C. §2511 (reprinted at Appendix C, page A-5).

4. Title 18 U.S.C. §2515:

> "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in vidence in any trial, hearing, . . . if the disclosure of that information would be in violation of this chapter."

STATEMENT OF THE CASE

Jurisdiction in the district court was pursuant to Title 18 U.S.C. §3231.

Concerning the first question presented (whether the evidence used against Petitioners should have been suppressed) the following, rather complicated fact situation is revealed by the record (citations are to the appendix filed in the Court of Appeals, eg., A. .....):

In November of 1969, at the instance of Nelson Bunker Hunt and W. Herbert Hunt, electronic interception devices were installed on the personal telephone lines of the Petitioners and others. (A. 903-912). As the attorney for the gov-

ernment conceded in this case, nobody "can deny or had denied the fact that there were illegal wiretaps." (A. 1009-1010). The Court of Appeals has affirmed convictions obtained by the government as a result of the wiretapping activity referred to here. See *United States v. McCann*, 465 F.2d 147 (5th Cir. 1972). The evidence against the two Hunts was suppressed by the district judge, but on appeal by the government the Court held that the two had no standing to challenge the search or seizure and reversed the lower court order of suppression. *United States v. Hunt*, 505 F.2d 831 (5th Cir. 1974).

Clearly, then, the electronic surveillance involved here was unlawful. See 18 U.S.C. §2511. The crux of this isue thus becomes whether information obtained as a result of the illegal eavesdropping found its way into this cause. More facts are needed.

Jon Joseph Kelley, one of those convicted for his part in the wiretapping, testified at a pre-trial hearing that as the telephones were monitored, tape recording were made of the pertinent conversations, which eventually were re-transcribed into a "master" tape. (A. 907-908). Kelley testified that in late November or early December of 1969, they met with Herbert Hunt and played some of the tapes of intercepted conversations. (A. 911-913). He also testified that within the week prior to Christmas of 1969, he met Bunker Hunt and delivered to him the tapes made during November and December. (A. 918-919). Among these tapes were the recorded conversations of the Petitioners. (A. 918-919). The tapes were shut off in late December of 1969. (A. 918-919).

In January of 1970, Kelley met with both Hunts and it was decided that the surveillance should be re-established on the telephones of the Petitioners (A. 919-920).

Kelley further testified that on several occasions during meetings with the Hunts at which tapes were played (in November, December and January), Herbert Hunt, after hearing the tapes, made the statement that "we need to get this information to Simpson." (A. 921-922). Bunker Hunt told Kelley in December that Simpson would be following up the investigation. (A. 922-923).

Tom Hunt, a cousin of Herbert and Bunker Hunt, testified that on December 19, 1969, he and Herbert contacted a private investigative agency called Dale Simpson and Associates to check into possible wrongdoing on the part of certain employees of HLH Products. (A.727-728). A contract was reached and a retainer paid sometime after Christmas of 1969. (A. 727-728). This was about a month after the wiretaps had been installed, (A. 905-906), and was also subsequent to the delivery of some of the contents of the interceptions to Herbert Hunt. (A. 911-913). The Simpson firm investigated and filed a report, receiving approximately $100,000.00 for their services (A. 750-751).

Dale Simpson testified that he was contacted on December 19, 1969, by Herbert Hunt, who asked for an appointment. (A. 769-771). Later that day, Simpson, Herbert Hunt and Tom Hunt met to discuss the matter. (A. 770-771). The investigation lasted from January of 1970 through April of 1971. (A. 775-776).

Simpson testified that no one ever mentioned that wiretaps had been installed (A. 771-772), that to his own knowledge he never received information that had been obtained through unlawful activity (A. 775-776), and that as far as he knew nothing in his report was derived from illegal wiretaps. (A. 778-779). None of this testimony is surprising; nor is it entitled to any significant weight. An admission would have been incriminating.

Simpson admitted that it would be logical for an investigator to ask his clients to give him any information they might have on the matter to be investigated, and that he would "certainly do that." (A. 781-782). He related that Herbert Hunt had discussed with him the investigation and the problems involved. (A. 783-784). He also met with Bunker Hunt. (A. 798-799).

It was shown by the affidavit of Patrick McCann, one of those convicted of wiretapping, that Herbert Hunt had stated in January of 1970, that the leads developed through the wiretaps would be followed up through further investigation. The name "Dale Simpson" was mentioned in connection with that statement. (A. 89-90). Neither Herbert nor Bunker Hunt were called as witnesses below, both being under indictment themselves.

Hunt Oil Company filed a civil suit against the Petitioners and others because of their alleged kickback schemes. In the petition, filed in November of 1970, (A. 752-754), Hunt Oil Company stated that it "did not discover and by the exercise of reasonable diligence could not have discovered the acts and damages hereinabove alleged prior to November, 1969." (A.

83-84). Thus, the Hunts are in the position of having judicially admitted that they did not and could not have discovered evidence of the alleged scheme until the time during which the wiretaps were first installed. If a coincidence, this is surely a strange one.

Simpson testified that his report was turned over to the Postal Inspectors Teel and Ingersol and the United States Attorney. (A. 778-779).

Attorney Andrew Barr testified that while employed as an Assistant United States Attorney he was in charge of prosecuting the persons accused of installing the wiretaps. (A. 577-579). He testified that he was first advised of the wiretaps when they were discovered on January 16, 1970. (A. 580-581). There were several tapes, including some of conversations of the Petitioners.

It was stipulated that Assistant United States Attorney Richard Stephens would testify that the government's investigation of the Petitioners did not begin until July 23, 1973, when an attorney for Bunker and Herbert Hunt came to his office, accompanied by Dale Simpson and some associates. These people orally complained of the allegedly criminal activities of the Petitioners, basing such complaint on the Dale Simpson Report. (A. 600-602). Stephens contacted Inspector Teel, told him to investigate and suggested that a good starting point would be the Dale Simpson Report. (A. 601-602). Prior to this time there had been no criminal complaint lodged against the Petitioners from any source (A. 603-604).

Inspector Teel testified that he did review the Simpson Re-

port and that after doing so, the government's investigation officially opened. (A. 633-634). Teel utilized the Simpson Report as a "blueprint" for the government's investigation. (A. 634-635). No witness interviewed during the government's investigation was not already mentioned in the Simpson Report. (A. 677-678). It can be said that the government's investigation stemmed directly from and was guided by the Simpson Report.

The second question presented (prejudicial delay in bringing the prosecution) involves the following facts:

The indictment, returned July 10, 1974, charges that prior to on or about July 1, 1968, and continuing until on or about January 1, 1970, the Petitioners and another devised a scheme to defraud HLH Products. (A. 10). The individual counts allege that mailings respectively occurred on or about July 15, 1969, (A. 14), on or about August 12, 1969 (A. 15), and on or about September 9, 1969. (A. 16). Thus it is clear from the pleadings that the alleged scheme was devised over six years prior to the filing of the indictment and that no alleged specific act of mailing occurred less than four years and ten months prior to the filing. Trial was begun March 17, 1975, just under seven years from the time the scheme was allegedly conceived, five and one-half years after the last alleged mailing occurred, and over five years from the date the scheme allegedly ended.

Additional facts are also pertinent. Hunt Oil Company privately complained to the government about the Petitioners alleged wrongdoing on July 23, 1973. The Hunt spokesman was an attorney for Bunker and Herbert Hunt, who was representing them in defense of criminal wiretapping charges then pend-

ing. (A. 600). Bunker and Herbert Hunt were shown to have been responsible for the placing of illegal wiretaps on the private telephone lines of the Petitioners in November of 1969. The Hunts were given the results of the interceptions in December of 1969, and January of 1970 (A. 911-920).

The authorities discovered the existence of the wiretaps in January of 1970, and recovered some tapes of conversations intercepted threby (A. 919, 580-583).

Hunt Oil Company filed a civil suit against the Petitioners and others in November of 1970, for damages stemming from the alleged wrongdoing (A. 592-595), asserting in the pleadings that the grounds for the suit were not discovered until November of 1969. (A. 84).

The office of the United States Attorney for the Northern District of Texas was made aware of the existence of the wiretaps and the tapes on the night they were discovered, January 16, 1970. (A. 580-585). Government agents listened to those tapes. (A. 584-585). The government also was apprised of the content of the Hunt civil suit soon after it was filed in November of 1970. (A. 592-593). It appears clear from the record that the government was aware of the facts supporting the subsequent indictment within a short time after the discovery of the taps.

The government later sought to prosecute Bunker and Herbert Hunt in connection with the wiretapping activities. At a hearing on that matter, held May 15, 1973, an Assistant United States Attorney, attempting to meet a Hunt assertion that they should be allowed to introduce evidence regarding the Petition-

ers wrongdoing at their own trial, pointed out to the trial court that no criminal charges had ever been filed by the Hunts against the Petitioners. (A. 597-598). Exactly two months later, the attorney for the Hunts appeared to press charges. (A. 600-601). Almost a year later, the Petitioners were indicted.

When the district court refused to suppress the evidence against them, the Petitioners were forced to trial. By way of defense, they sought to show that H. L. Hunt had, in fact, authorized the activities made the basis for the indictment. In support thereof, the Petitioners introduced two letters and a memorandum signed by H. L. Hunt purporting to authorize their activities. The government stipulated to the authenticity of Hunt's signatures, after its own experts examined them. (A. 1456-1461).

The government sought to rebut these documents by calling Tom Hunt who said that H. L. Hunt used to practice his signature on blank pieces of paper. (A. 1482-1485). Also, strictly for "impeachment" only (A. 1413), the government was allowed to show that H. L. Hunt had once denied signing the documents, (A. 1414-1415), even though the authenticity of the signatures was stipulated.

H. L. Hunt was unavailable as a witness because he died in November of 1974 (A. 1389), five months after the filing of the indictment, and within only a short time of the first trial setting of the case. (A. 2).

The third question presented (the government's failure to make timely disclosure of evidence favorable to the defense) concerns the following facts:

Prior to trial the Petitioners filed several motions for discovery. (A. 158, 161, 172). The Petitioners made many informal requests as well. (A. 456-495). Pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), the Petitioners specifically asked that the government disclose any evidence of a favorable or exculpatory nature, including statements or other evidence "indicating or tending to indicate that H. L. Hunt, HLH Products or Hunt Oil Company, or any official, employee, agent or associate thereof knew of, agreed to, advised or acquiesced in the alleged fraudulent schemes." (A. 176-177).

At a pre-trial hearing, the Petitioners elicited from IRS Agent Gene Boren that he had a number of conversations with Paul Rothermel, a former Hunt employee (A. 685-687), who had been granted immunity by the government in connection with these cases. (A. 200). Boren testified that he made summaries of the conversations, (A. 686-689). Boren indicated that Rothermel had spoken of H. L. Hunt authorization (A. 693-694).

The Petitioners also called Postal Inspector Teel in connection with their discovery motions and attempted to elicit from him whether he had inttrviewed anyone who might have indicated that Hunt knew of or authorized the Petitioners activities. (A. 654-655). The government objected. (A. 654-655). During argument by counsel on the question, the prosecutor specifically informed the court that "we'll sure make available everything that is available in our files . . . ." The prosecutor felt that it was only "taking up time" to examine witnesses on the subject and said "We'll comply . . . ." (A. 655-656). The judge sustained the objection, stating that he did so in view of

the prosecutor's assurance that he would furnish all such statements in the possession of the government. The court ordered that the prosecutor produce "very promptly." (A. 659-660). That was December 4, 1974.

The prosecutor knew from Agent Boren's testimony that Rothermel had made statements germane to the issues at hand. Yet he made absolutely no effort to determine the contents of those statements; he never even contacted Boren about them prior to trial (A. 1586-1587).

Agent Boren had a statement given by Rothermel on March 12, 1971, which confirmed the fact that H. L. Hunt knew of the existence of the brokerage agreement. (A. 554-555).

The circumstances under which that statement was finally disclosed are fully set out in the record. (See A. 498-502, 527-536, 1580-1644). The testimony reveals that defense counsel was not made aware of the contents of Rothermel's statement to the government until either just before or just after the trial was over.

REASONS FOR GRANTING THE WRIT

1. **The use of illegally seized and tainted evidence against Petitioners violated the Fourth Amendment as applied in *Weeks v. United States* 232 U.S. (1914), and *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920), and the statutory exclusionary rule established in Title 18 U.S.C. § 2515.**

The facts heretofore noted reveal that unlawful electronic interception of communications occurred. See 18 U.S.C. §2511. This being established, the "ultimate burden of persuasion" lies

with the government to establish that its evidence is untained by the unlawfully seized evidence, ***either directly or indirectly***, but rather is of independent origin. ***Alderman v. United States***, 394 U.S. 165 (1969). The record does not establish that the government carried its burden.

It is established that the function of the exclusionary rules is not merely to prevent the use of tainted evidence in court; rather, it is to prevent any use of such evidence. ***Silverthorne Lumber Co. v. United States***, supra. This plainly includes the use of unlawfully seized evidence as an investigative tool to develop or discover other evidence against an accused. The following language from ***United States v. Falley***, 489 F2d 33 (2nd Cir. 1973) is particularly appropriate:

> Although the government has the burden of proving * * * that the evidence has not been tainted either directly or indirectly, an inquiry must first be made as to the *cause of the investigation*. If the investigation was in fact instigated by information that was discovered independently of the illegal intrusion and if the illegally obtained information would not have been, in and of itself, sufficient in the normal case to trigger this type of investigation, then the investigation has not been tainted an dno indirect, derivative taint attaches to any of the evidence produced by the investigation. (Emphasis supplied).

Here the "cause" of the investigation was highly suspect. Prior to the wiretaps there had been no suspicion of wrongdoing. Only after they had been installed was any allegation made against Petitioners. The government's denials, considering the web of circumstances that entangles the participants, does not comport with reason or experience. In light of the record, the denials are incredible. In ***United States v. Magad-***

dino, 496 F2d 455 (2nd Cir. 1974), government denials were also found unbelievable when the entire record was considered. See also *United States v. Resnick*, 483 F2d 354 (5th Cir. 1973).

The government was required to estabilsh that its evidence was not gathered through the exploitation of illegally seized information, but rather was come at "by means sufficiently distinguishable to be purged of the primary taint." ***Wong Sun v. United States,*** 371 U.S. 471 (1963). Here the Simpson investigation was instigated by persons engaged in unlawful wiretapping activity who had no suspicion of wrongdoing until after the wiretaps had intercepted communications. The government's investigation was a "blueprint" of the Simpson report, and resulted in the discovery of no significant witness or evidence not already contained in the Simpson document. The principals to the wiretap (Herbert and Bunker Hunt) did not testify that they did not transmit illbegotten information to Simpson. Without such testimony the denials of others that they (the others) did not give Simpson tainted evidence will not suffice to sustain the government's burden of proving independent origin. The totality of the circumstances weighs too heavily against it. Petitioners are entitled to a new trial, at which all impermissibly seized or tainted evidence must be excluded.

2. Petitioners were denied due process of law because of an extreme and prejudicial lapse of time between the date of the offense and the indictment and trial.

The Due Process Clause of the Fifth Amendment would require dismissal of an indictment if it were shown at trial that

pre-indictment delay caused substantial prejudice. *United States v. Marion,* 404 U.S. 307 (1971). Here Petitioners have shown an extreme delay in bringing prosecution, even after the government was informed of the allegations against Petitioners. Additionally, Petitioners established that but for that delay, H. L. Hunt would have been available to testify in this cause. Hunt's value as a witness for the defense was also shown. At the very least Petitioners should have had the opportunity to make an informed decision as to his utility as a witness. This they were denied. The trial judge, at sentencing, noted his surprise at the guilty verdicts. Doutbless, Hunt could have potentially tipped the balance in Petitioners' favor, for Hunt would have either confirmed the written authorizations produced at trial, or would have been made out a liar. Either result would have beneficially aided the defense.

Marion, supra, does not seem to flatly say that it must always be the government that is responsible for the delay. It is submitted that it does not matter that the acts of private citizens also contributed to the prejudicial delay, and it is further submitted that Petitioners established enough below to shift the burden to the government to demonstrate that no prejudice occurred or that same is harmless. See *Dickey v. Florida,* 398 U.S. 30 (1970), concurring opinion by Justice Brennan.

Because prejudice is indicated below and because the government failed to demonstrate that any prejudice was harmless, Petitioners are entitled to a new trial. This is especially so where the government was impermissibly allowed to use in evidence a deposition of H. L. Hunt in an attempt to establish

before the jury that he did not acquiesce in Petitioners' acts. This only increased the prejudice that resulted because of the delay. A writ should issue.

3. Petitioners were denied due process of law when the government suppressed and failed to disclose evidence materially favorable to the defense until the final seconds of the trial.

Suppression by the prosecution of evidence favorable to an accused on request violates due process where the evidence is material either to guilt or punishment. *Brady v. Maryland,* 373 U.S. 83 (1963). Once the prosecutor is ordered to disclose certain material, he is under a continuing duty to do so. Rule 16(g), Fed.R.Crim.P. (prior to 1975 amendments).

In this case the prosecutor was specifically ordered by the court to disclose any statement known to them that indicated that H. L. Hunt or any officer of the victim company had knowledge of the acts of Petitioners. Petitioners had attempted to secure disclosure at a pre-trial hearing held December 4, 1974, but was prevented from so doing by a government objection to the questions being asked. (A. 655). The prosecutor then assured the court that timely disclosure would be made and based upon such assurance the court sustained the objection, ordering disclosure "very promptly." (A. 659-660).

It was at the very last moment of trial that the statements curiously appeared on the counsel table. It was shown that the prosecutor had not even bothered to check with the agent having custody of the statements until the trial was nearly over, on March 19, 1975. (A. 1586-1588).

When material exists of which the accused has the right to be informed by the government, such disclosure must be made in a timely manner, so as to afford the accused the opportunity to make effective use of same in the preparation and presentation of a defense. *Brady v. Maryland,* supra; *United States v. White,* 450 F2d 264 (5th Cir. 1971); Rule 16(g), Fed.R.Crim.P.

The record reflects that many pretrial requests, both formal and informal, were made for the disclosure of any such evidence. The record also reveals that the prosecutor did not even check with the agent to see if any such statements existed until the eleventh hour of trial. This represents such a gross disregard for Petitioners' rights as to be inexcusable and perhaps even bad faith.

The government countered below with the argument that there was no error since Petitioners already knew what the witness Rothermel had said to the agents. The record does not reflect that Petitioners were ever advised of the contents of the statements so belatedly disclosed by the govtrnment. The detail and specificity of the statements was significant and valuable as a defense tool, especially in light of the government's grant of immunity to Rothermel, which had theretofore been viewed as an indication to the defense that Rothermel would probably not be a useful defense witness.

It is clearly not for the government to decide what may or may not actually be "favorable" to the defense. Whenever there is some doubt about the matter disclosure must be made. Anything less is error. See *United States v. Crane,* 445 F2d

509 (5th Cir. 1971); *Pierce v. United States,* 414 F2d 163 (5th Cir. 1969); *Levin v. Clark,* 408 F2d 1209 (D.C. Cir. 1968).

The harm by the government's failure to disclose the statements in question is highlighted by the death of H. L. Hunt, upon whose prior authorization of Petitioners' conduct the entire defense was predicated. Materiality and harm have both been established; the government's flagrant disregard of the court's order to disclose must be considered to have prejudiced Petitioners' chances for a favorable verdict. The convictions should be reversed.

CONCLUSION

For the compelling reasons shown herein, a writ of certiorari should issue to review the judgments entered below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert T. Baskett, attorney for Petitioners and a member of the Bar of this Court, hereby certify that all the parties required to be served have been served by placing true copies of this Petition in the mail, postage prepaid, to the following:

1) The Solicitor General, Department of Justice, Washington, D.C. 20530;

2) The United States attorney for the Northern District of Texas, 1100 Commerce Street, Dallas, Texas 75202.

Robert T. Baskett

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
Fifth Circuit

United States of America,
Plaintiff-Appellee,

v.

John H. Brown and John W. Curington,
Defendants-Appellants.

Jan. 15, 1976

Appeal from the United States District Court for the Northern District of Texas.

Before TUTTLE, GODBOLD and GEE, Circuit Judges.

PER CURIAM:

Appellants, former employees of the Hunt Oil Corporation, appeal their convictions under the federal mail fraud statute, 18 U.S.C. § 1341. They were found guilty by a jury of having knowingly devised a scheme to defraud HLH Products, a division of Hunt Oil, by establishing a brokerage firm to receive fees for servicing an HLH Products account when in fact no such fees were authorized by HLH Products and no services were actually rendered. Both appellants received probationary sentences and each was fined a total of $3,000 and was required to make restitution to Hunt Oil Company in the amount of $2,501.40.

[1] Appellants' primary contention is that a critical part of the evidence presented by the government was discovered as a

result of, and was therefore tainted by, illegal electronic surveillance of their private telephone conversations by Bunker and Herbert Hunt and consequently should have been suppressed under the principle announced in *Nardone v. United States*, 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307 (1939). They alleged at trial, as they do now on appeal, that wiretap material was turned over to a private investigatory agency, the Simpson firm, which was conducting an investigation of possible wrongdoing by various Hunt employees, and that this illegally-obtained information formed the primary basis of the Simpson firm's report which later served as the "blueprint" for the instant criminal proceedings. These allegations, however, are totally unsupported by any direct evidence in the record; at trial a number of people who worked on the Simpson report, including Mr. Simpson himself, denied that they had ever received any information from the illegal wiretaps. Furthermore, there was a substantial amount of testimony establishing that the Simpson report was compiled almost exclusively from business records kept by the appellants themselves — a source wholly free from any taint of illegality. It is thus clear that the government carried its burden of proving that the evidence at issue here was derived from an independent source, *Nardone, supra*, at 341, 60 S.Ct. 266, and that consequently the idstrict court did not err in denying appellants' motion to suppress.

[2] Appellants' other major contention is that there was insufficient evidence of intent to defraud to support the jury verdict. Their sole defense at trial was the allegation that H. L. Hunt had authorized, both orally and in writing, appellants' business activities giving rise to the instant prosecutions. We

find, however, that there is substantial evidence in the record surrounding the circumstances of the transactions involved to support the jury's verdict on this issue. *See Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942).

We have examined appelants' other contentions and find them to be wtihout merit. The judgment of the district court is accordingly affirmed.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-2240

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JOHN H. BROWN and
JOHN W. CURINGTON,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Texas

ON PETITION FOR REHEARING

(March 4, 1976

Before TUTTLE, GODBOLD and GEE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled an dnumbered cause be and the same is hereby denied.

APPENDIX C

Title 18 U.S.C. § 2511(1)

§ 2511 Interception and disclosure of wire or oral communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who —

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or orai communication;

(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when —

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia,

the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained throug hthe interception of a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years, or both..

Supreme Court, U. S.
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No. 75-1597

In the Supreme Court of the United States

OCTOBER TERM, 1976

JOHN H. BROWN AND JOHN W. CURINGTON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet. App. A-1 to A-3) is reported at 525 F. 2d 1256.

JURISDICTION

The judgment of the court of appeals was entered on January 15, 1976, and a petition for rehearing was denied on March 4, 1976. On March 23, 1976, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to May 3, 1976, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court erred in denying petitioner's motion to suppress evidence allegedly obtained by illegal electronic surveillance conducted by private individuals.

2. Whether pre-indictment delay deprived petitioners of due process of law.

3. Whether the government's alleged failure to disclose certain evidence to the defense deprived petitioners of a fair trial.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioners were convicted on three counts of mail fraud, in violation of 18 U.S.C. 1341. Imposition of sentence was suspended and petitioners were placed on three years' probation on condition that they pay their victim restitution in the amount of $2,501.40. Petitioners were also fined $1,000 on each count. The court of appeals affirmed *per curiam* (Pet. App. A).

1. The evidence at trial established that petitioners, former employees of the Hunt Oil Corporation ("Hunt Oil"), defrauded HLH Products ("HLH"), a division of Hunt Oil, by establishing a brokerage firm to receive fees for servicing an HLH account when no such fees had in fact been authorized by Hunt Oil or HLH and no services were actually rendered by petitioners (Pet. App. A-1).

HLH Products owned and operated food processing plants in different areas of the country. Petitioner Brown was employed by HLH as its sales manager, while petitioner Curington was in charge of the company's day-to-day operations (Tr. 465-466). In December 1967, petitioner Brown met with James Burkett, an institutional sales representative for HLH, and asked Burkett whether he would like to establish a food brokerage business in the Chicago area. When Burkett assented, petitioner Brown instructed Burkett to set up a company in Chicago, but cautioned him not to use his own name or his home address in connection with the company. Burkett then founded an Illinois corporation named D. Buckingham's, Ltd. (Tr. 482-496).

On September 9, 1968, petitioner Brown wrote a letter to H. L. Hunt, principal stockholder of Hunt Oil, stating that he had met recently with the chief buyer of canned vegetables for Topco Associates and that the buyer had "suggested that we pay brokerage on their purchases to Buckingham, Ltd." (Tr. 470-471). Petitioner Brown advised acquiescing in the request for fear of losing the Topco account if the brokerage were not paid (*ibid.*). In fact, no such meeting had taken place, no request to pay brokerage was ever made by Topco, and Topco's buyer had never heard of D. Buckingham's, Ltd. (Tr. 567-568, 634-635, 816). On September 17, 1968, petitioner Brown wrote letters to D. Buckingham's, Ltd., and to the billing department of Hunt Oil, informing them that Buckingham's was to receive a commission of three percent on all Topco purchases as of September 1, 1968 (Tr. 472-473). Thereafter Hunt Oil forwarded monthly brokerage checks to D. Buckingham's, Ltd., although that company provided no brokerage services in connection with Topco or any other account. The proceeds from those brokerage checks, which ranged from $525 to $2,217.32 per month, were delivered to petitioners and others by Burkett (Tr. 527-528). Petitioners also took several precautions to maintain the secrecy of their fraudulent operation (Tr. 499, 506-508, 572-578).

In March 1969, following an annual meeting of stockholders, Tom Hunt, an employee of Hunt Oil and nephew of H. L. Hunt, began an investigation into substantial financial losses being suffered by HLH (Tr. 774-775, 845). Petitioner Curington tried, without success, to prevent Hunt from visiting HLH plants and speaking with employees during this investigation (Tr. 846-850). At the same time, petitioner Brown requested and received Burkett's resignation from HLH "because of an investigation that [Tom Hunt] had begun in Dallas

regarding HLH Products" (Tr. 516-517). In August 1969, petitioner Brown wrote a letter to D. Buckingham's, Ltd., cancelling the brokerage agreement (Tr. 525-526).

2. Petitioners testified in their defense and acknowledged forming a brokerage firm that provided no services to HLH. They claimed, however, that H. L. Hunt, who died in November 1974 (four months after the indictment and four months prior to trial), had authorized them to supplement their salaries by engaging in such conduct (Tr. 723, 732-736, 800-806). Petitioners produced three letters, purportedly signed by H. L. Hunt, authorizing them to engage in "personal business transactions," granting petitioner Curington a lifetime employment contract, and prohibiting any member of the Hunt family from inquiring at any time into any "outside business activities" of petitioners (Tr. 716-722). On cross-examination of petitioner Curington and in rebuttal, the government established that H. L. Hunt had been known to practice his signature before signing actual documents, that he would leave the practice signatures "lying any place," and that in 1971 he had unequivocally denied having signed or authorized the letters offered by petitioners (Tr. 787-788, 855, 857).

ARGUMENT

1. Petitioners' primary contention (Pet. 12-14) is that the government's evidence at trial was tainted by unlawful electronic surveillance undertaken by private persons and should have been suppressed pursuant to 18 U.S.C. 2515. However, both lower courts correctly concluded that the government's proof was not directly or indirectly attributable to any illegal wiretapping, and this finding of fact does not warrant further review. See *Berenyi* v. *Immigration Director*, 385 U.S. 630, 735; *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275.

Within a few months after the commencement of Tom Hunt's investigation into HLH's financial losses, suspicions focused on petitioners and another employee, Paul Rothermel. After the three men had resigned from the company in November 1969, Tom Hunt and his cousin, William Herbert Hunt, retained Dale Simpson, president of a Dallas detective agency, to assist in the investigation (Tr. 136-137). The Simpson investigation continued for a year and a half and resulted in a massive report, which was turned over to Hunt Oil (Tr. 199-200). Eventually, the report became the starting point for the federal investigation that culminated in petitioners' indictment.

Meanwhile, in January 1970, illegal wiretaps were discovered on the telephones of petitioners, Rothermel, Tom Hunt, and another officer and employee of Hunt Oil. These wiretaps had been installed on instructions of H. L. Hunt's sons, William Herbert and Nelson Bunker Hunt, who were subsequently indicted for their authorization of electronic surveillance. Jon Kelley, one of the wiretappers, testified at a hearing in the district court that on one occasion when he delivered tapes of the overheard conversations to the Hunt brothers, William Herbert Hunt had stated: "We need to get this information to Simpson" (Tr. 305).

Based on this statement and on the assertion that the government's denial of taint "does not comport with reason or experience" (Pet. 13), petitioners allege that the Simpson report was infected with information gained from the unlawful electronic surveillance ordered by William Herbert and Nelson Bunker Hunt and that the government's proof at trial, much of which was indirectly traceable to the report, should have been suppressed. At an evidentiary hearing held in the district court, however, the government clearly satisfied its burden of establishing that none of the information on which its investigation

was based, and none of its evidence at trial, had been derived in any way from the illegal wiretaps. For example, Tom Hunt, with whom Simpson principally dealt, testified that he never turned over wiretap information to Simpson and that the evidence discussed in the Simpson report had been gathered from the Hunt Oil Company files, which contained a wealth of incriminating documents (Tr. 137-138). Simpson, an auditor, and another person who worked with Simpson on the investigation also testified that they had no knowledge of the wiretaps and did not receive any information derived from them and that their report was grounded almost exclusively on a study of company records (Tr. 172-203, 211-228, 235-273). Furthermore, an F.B.I. agent who investigated the illegal wiretaps testified that he had found no evidence that Simpson had been aware of the taps (Tr. 345). As the court of appeals remarked (Pet. App. A-2):

> [Petitioners'] allegations [of taint] * * * are totally unsupported by any direct evidence in the record; at trial a number of people who worked on the Simpson report, including Mr. Simpson himself, denied that they had ever received any information from the illegal wiretaps. Furthermore, there was a substantial amount of testimony establishing that the Simpson report was compiled almost exclusively from business records kept by the [petitioners] themselves—a source wholly free from any taint of illegality. It is thus clear that the government carried its burden of proving that the evidence at issue here was derived from an independent source, * * * and that consequently the district court did not err in denying [petitioners'] motion to suppress.

2. Petitioners contend (Pet. 14-16) that the government's delay in bringing criminal charges against them deprived them of due process of law. Specifically, petitioners allege

that they were prejudiced by the government's failure to return an indictment until July 1974, four months before the death of H. L. Hunt, who they assert "could have potentially tipped the balance in Petitioners' favor" (Pet. 15).

It is undisputed that the indictment was returned within the applicable statute of limitations, which is "the primary guarantee against bringing overly stale criminal charges." *United States* v. *Ewell*, 383 U.S. 116, 122. Moreover, petitioners have not shown that "the pre-indictment delay * * * caused substantial prejudice to * * * [their right] to a fair trial and that the delay was an intentional device to gain tactical advantage over [them]." *United States* v. *Marion*, 404 U.S. 307, 324 (footnote omitted).[1] It was not until July 1973, in connection with the prosecution of William Herbert and Nelson Bunker Hunt, that the government first became aware of the possible mail fraud violations by petitioners. An inquiry was immediately begun by a postal inspector, and the indictment was returned in less than a year. Indeed, petitioners do not allege that any delay was intentional or was designed to hinder their defense.

Petitioners' claim of prejudice due to H. L. Hunt's death is similarly insubstantial. Petitioners and Hunt all appeared before the grand jury on June 19, 1974, at which time the deteriorating condition of Hunt's health was readily apparent to petitioners and their counsel (R. 252-253).[2] The indictments against petitioners were returned three weeks

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[1]The government's petition for a writ of certiorari in *United States* v. *Lovasco*, No. 75-1844, presents the question whether it is sufficient for a defendant who seeks dismissal of an indictment because of pre-indictment delay to satisfy either, rather than both, branches of the *Marion* test. Since petitioners have satisfied neither branch, there is no reason to hold this case pending disposition of the petition in *Lovasco*.

[2]"R." refers to the record on appeal in the court of appeals.

later. Although H. L. Hunt lived for four more months, petitioners never sought to take his deposition under Rule 15(a), Fed. R. Crim. P., nor did they move for a speedy trial (Tr. 332). In fact, trial was originally scheduled for November 18, 1974, shortly before Hunt's death, but was postponed because of petitioners' request for an extension of time in which to file pretrial motions (Tr. 327). Petitioners' conduct was thus wholly inconsistent with their present claim that H. L. Hunt's testimony was crucial to their defense—a claim that is, in any event, highly suspect on the record in this case.

3. Petitioners claim (Pet. 16-18) that they were denied a fair trial because the government suppressed an allegedly exculpatory statement by Paul Rothermel, a former Hunt Oil employee, that H. L. Hunt had been aware of the Buckingham brokerage arrangement and had approved of petitioners' supplementing their income through "side dealings." Petitioners contend that this statement had been made to I.R.S. Agent Gene Boren in 1971, but was not turned over to them until the final day of trial, following the close of the evidence (R. 339-348).

This allegation was fully explored and rejected by the district court, which found, after a hearing, that Rothermel's statement had been in the possession of the defense prior to trial (R. 420-422). Indeed, not only had petitioners received a copy of the statement before the close of testimony in the case (R. 376-377), but also petitioners' counsel was expressly advised by the government during trial that Rothermel had once made certain remarks favorable to the defense. Nonetheless, petitioners determined not to call Rothermel as a witness because of their doubts as to his credibility (R. 378). In addition, the record indicates that petitioners independently learned of the existence and substance of the Rothermel statement more than three months before trial, when Agent Boren testified at a pretrial hearing that he had interviewed petitioner Curington and Rothermel in March 1971 and that both men had told

him that H. L. Hunt had authorized the outside business activities in question. Agent Boren further testified that Rothermel's statements had been recorded, transcribed, and preserved in summary form and were available from the I.R.S. files (R. 422-425).

As this Court recently indicated in *United States* v. *Agurs*, No. 75-491, decided June 24, 1976, slip op. 12, n. 16, quoting from *Giles* v. *Maryland*, 386 U.S. 66, 98 (Fortas, J., concurring), there is no duty to disclose material "otherwise known to the defense." See also *United States* v. *Ross*, 511 F. 2d 757, 763 (C.A. 5), certiorari denied, 423 U.S. 836; cf. *Rosenberg* v. *United States*, 360 U.S. 367, 369-370; *United States* v. *Ruggiero*, 472 F. 2d 599, 604 (C.A. 2), certiorari denied, 412 U.S. 939. Here, even though petitioners were fully aware of the Rothermel statement, the government called it to petitioners' attention and supplied them with a copy of it during trial. The district court therefore correctly concluded that the government did not violate its obligations under *Brady* v. *Maryland*, 373 U.S. 83.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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